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DHONDO NARAYAN SHIRALKAR *v.* ANNAJI PANDURANG KOKATNUR, I.L.R. (1939) Bom. 66.

The question in this case related to the right of an appellant to withdraw his appeal and the learned Judges have held that he is entitled as of right to withdraw his appeal provided that the respondent has not acquired any interest thereunder. If the respondent has obtained any rights under the appeal, the learned Judges have held that the appellant can withdraw the appeal only with the permission of the Court. The rules as to withdrawal of suits in this country from the time of the Civil Procedure Code of 1859 are so dissimilar to those of the old English rules as to non-suit at common law and the plaintiff's right to have his bill dismissed in equity and the rules of the Supreme Court under O. 26 of the English rules which have superseded them that no useful purpose can be served by looking for light from the English law on the point. So far as this country is concerned, O. 23, r. 1 of the Civil Procedure Code only applies to suits and does not deal with withdrawal of appeals and Sir John Beaumont, C.J., has observed in this case that any reference to S. 107 of the Civil Procedure Code will not improve matters as it can only enable an appellant to withdraw the suit and not the appeal. In this connection it was observed as early as *Ram Pershad Ojha* v. *Bhurosa Koonwar*[1], that the corresponding provisions of the old Civil Procedure Code of 1859 entitled the appellant to withdraw his appeal as of right. The Madras High Court however in an old case in

1. (1868) 9 W.R. 328.

Kareem Bee v. *Beegam Bee*[1] held that there was no provision in the Code of 1859 to enable the appellant to withdraw his appeal as of right and that he could do so only with the leave of the appellate Court in all cases. The Allahabad High Court in the recent case of *Kanhaya Lal* v. *Partab Chand*[2] has however held that under the present Code reading the provisions of O. 23, r. 1 along with S. 107 (2), the appellant can withdraw his appeal unconditionally, his only liability being to pay the costs of the respondent. This view is opposed to what the learned Judges have laid down in the case under notice and the learned Judges have not in their judgment dealt with this Allahabad case. If this view of the interpretation of the provisions of the Civil Procedure Code is correct, it is doubtful whether any leave of the appellate Court is necessary for the appellant withdrawing his appeal even though the respondent may have obtained some rights as in this case, because the terms of O. 23, r. 1 (1) are clear in requiring no leave or permission of the Court. If, on the other hand, the correct view is that there is no provision in the Code relating to this matter and it has to be dealt with under the inherent powers of the Court, there is every justification for the appellant not nullifying the rights of the respondent, if any, in the appeal and his being allowed to withdraw the appeal only with the permission of the Court. We are not sure whether the learned Judges will regard the right of the respondent under O. 41, r. 33 of the Code to relief even though he has preferred no memorandum of cross-objections to be such a substantial right which will prevent the appellant from withdrawing the appeal without the permission of the Court. If, however, the respondent has been completely successful in the first Court and can get nothing more, the appellant even according to the learned Judges in this case, can withdraw his appeal without any permission from the Court.

TUKARAM GANPATRAO SURVE *v.* ATMARAM VINAYAK GONDHALEKAR, I.L.R. (1939) Bom. 71.

We had occasion to consider the retrospective operation of S. 53-A of the Transfer of Property Act in commenting on the decision of the Calcutta High Court in *Mahammad*

1. (1867) 3 M.H.C.R. 368 : 2 Mad. Jur. 332.
2. (1931) A.L.J. 232.

Hosain v. *Jamini Nath Bhattacharjya*1 at p. 11 of the Notes of Indian Cases in (1938) 2 M.L.J. The decisions which had appeared till then will be found collected in that note. This decision which has been given since then takes the same view as the one taken in *Mahammad Hosain* v. *Jamini Nath Bhattacharjya*1 and holds that the section is retrospective in its operation. This case cannot put an end to the conflict on the question. The authority of this decision is to some extent weaker because the two decisions on which the learned Judges have relied, namely, the decisions in *Mahammad Hosain* v. *Jamini Nath Bhattacharjya*[1] and *Wakefield* v. *Kumar Rani Sayeeda Khatun*[2] have since been dissented from in *Jagdamba Prasad Lalla* v. *Anadi Nath Roy*[3] which we have noticed in the note referred to above. Further, even the Calcutta High Court in a later case in *Mohendra Narayan Roy Chowdhury* v. *Profulla Kumar Guha*[4] has held that the weight of authority is against retrospective effect being given to the section. Reference may also be made in this connection to the latest case of the Patna High Court in *Baldeo Singh* v. *Sheikh Muhammad Akhtar*[5]. The learned Judges in the case under notice have observed that there is no difference between the retrospective operation of S. 53-A and S. 92 of the Transfer of Property Act as amended and referred to *Tota Ram* v. *Ram Lal*[6] in support of the retrospective operation of the latter section. With reference to S. 92, we would refer to the latest case in *Srinivasulu Naidu* v. *Damodaraswami Naidu*[7], where all the relevant points are considered and the decisions referred to and the conclusion arrived at that S. 92 is not retrospective in its effect. Under these circumstances, nothing but a decision of the Privy Council will settle the question finally, unless the legislature sets the conflict at rest.

REVAPPA NANDAPPA HATTARKI (FIRM) *v.* BABU SIDAPPA ERANDOLE, I.L.R. (1939) Bom. 104.

The question whether S. 69 (2) of the Indian Partnership Act bars suits after the coming into force of the Act by unregis-

1. I.L.R. (1938) 1 Cal. 607. 2. (1936) I.L.R. 15 Pat. 786.
3. (1938) I.L.R. 17 Pat. 460. 4. A.I.R. 1938 Cal. 795.
5. (1939) 20 P.L.T. 399: 1939 P.W.N. 331.
6. (1932) I.L.R. 54 All. 897 (F.B.).
7. A.I.R. 1938 Mad. 779.

tered firms in respect of causes of action existing prior to the coming into force of the Indian Partnership Act has been the subject of conflicting decisions. It was held in *Surendra Nath De* v. *Manohar De*[1] that such suits were not saved by the provisions of S. 74 (*b*) of the Act which were held to be confined to proceedings pending at the date when the Act came into force. This view was held to be confirmed by the terms of S. 1 (3) of the Act which gave one year's time for the provisions of S. 69 coming into force, thus enabling existing firms to register themselves or bring suits in the meanwhile. This view was followed by the Madras, Patna and Lahore High Courts in *Parinchu* v. *Ravi Varma*[2], *Sundararaja Aiyangar* v. *Mannarswami (Firm)*[3], *Firm of Syed Ibrahim Sahib* v. *Gurulinga Aiyar*[4], *Shazad Khan* v. *Darbar Baber Kuchhi*[5], *(Firm) Krishan Lal-Ram Lal* v. *Abdul Ghafur Khan*[6] and by Bennet, J., in *Danmal Parshotamdas* v. *Baburam Chhotelal*[7]. This view proceeded on a narrow view of S. 74 (*b*) that it referred only to pending proceedings and not subsequent proceedings on pre-existing causes of actions as well. That this view is incorrect was pointed out by Sir Shah Sulaiman, C. J., in *Danmal Parshotamdas* v. *Baburam Chhotelal*[7] and has since been followed in *Girdharilal Son & Co.* v. *Kappini Gowder*[8], *Soonoiram* v. *Junjilal*[9] and the case now under notice. After this decision was reported in *Revappa* v. *Babu Sidappa*[10], it has been followed by the Madras High Court in L. P. A. No. 74 of 1937 (16th March, 1939), (1939) 1 M.L.J. 35 (Notes of Recent Cases) which has not yet been fully reported. We venture respectfully to submit that the fuller examination of the terms of S. 74 (*b*) in these decisions will have the effect of changing the course of decisions in the Calcutta, Lahore and Patna High Courts.

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1. (1934) I.L.R. 62 Cal. 213.
2. (1936) 45 L.W. 276.
3. (1937) 1 M.L.J. 610.
4. (1937) 2 M.L.J 717.
5. (1936) I.L.R. 15 Pat. 810: A.I.R. 1937 Pat. 16.
6. (1935) I.L.R. 17 Lah. 275: A.I.R. 1935 Lah. 893.
7. (1935) I.L.R. 58 All. 495.
8. (1938) 2 M.L.J. 44.
9. A.I.R. 1938 Rang. 273 (F.B.).
10. (1938) 40 Bom.L.R. 1275.

MURADAN SARDAR *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL, I.L.R. (1939) 1 Cal. 425.

The main point decided in this case is whether the period of three months fixed in S. 9, sub-S. (1), cl. (*c*) of the Provincial Insolvency Act can be extended with reference to S. 5 of the Indian Limitation Act by virtue of the provisions of S. 78 of the former Act. The learned judges have held that the period prescribed in S. 9, sub-S. (1), cl. (*c*) is not a period of limitation and so cannot be extended thus taking the same view as the Full Bench of the Madras High Court in *Chenchuramana* v. *Arunachalam*[1].

In coming to this conclusion, one of the learned judges has relied on the marginal note to S. 9 as showing the drift of the section and quoted the authority of Collins, M.R., in *Bushell* v. *Hammond*[2]. Within two months after the case in *Bushell* v. *Hammond*[2], the question of the value of the marginal notes in Indian enactments came up before the Privy Council in *Balraj Kunwar* v. *Jagatpal Singh*[3] and Lord Macnaghten delivering the opinion of the Privy Council said that it was well settled that marginal notes to the sections of an act of Parliament could not be referred to for the purpose of construing the Act and that the contrary opinion originated in a mistake which was exploded long ago. His Lordship also said that there was no reason for giving the marginal notes in an Indian Statute any greater authority than the marginal notes in an English Act of Parliament. This decision of the Privy Council is binding on the Indian Courts and has been since generally followed. (*See* In re *Syamo Maha Patro*[4] and *Sir Dhunjibhoy Bomanji* v. *Ganpa Khandu Goli*[5].) The Allahabad High Court however in a Full Bench decision in *Ram Saran Das* v. *Bhagwat Prasad*[6], canvassed this proposition and observed that marginal notes were the subjects of discussion and resolution in the legislative councils and were therefore useful guides in construing the sections. It must however be noticed that even King, J., who delivered the leading judgment in this case observed at page 425 that when finally the bill was taken into consideration in the Council, the marginal notes were

1. (1935) 69 M.L.J. 283: I.L.R. 58 Mad. 794 (F.B.).
2. (1904) 2 K.B. 563.
3. (1904) L.R. 31 I A. 132: I.L.R. 26 All. 393 (P.C.).
4. (1932) 62 M.L.J. 742: I.L.R. 55 Mad. 903 (F.B.).
5. (1932) I.L.R. 57 Bom. 699,
6. (1928) I.L.R. 51 All. 411 (F.B.).

not ordinarily read out and formally passed by the Council along with the clauses. This seems to indicate that they are not parts of the enactments but are considered in the discussions of the legislature. It is well settled that discussions in the legislature alone are not to be referred to in construing the enactment. This was laid down by the Privy Council in *The Administrator-General of Bengal* v. *Premlal Mullick*[1] and *Krishna Aiyangar* v. *Nallaperumal Pillai*[2]. Rangnekar, J., followed the view regarding the value of the marginal notes of the Allahabad Full Bench in *Emperor* v. *Sayad Esmail*[3], but subsequently retracted from the same in *Dharwar Urban Bank, Ltd.* v. *Krishnarao Anantrao Konur*[4] and followed the view of the Privy Council in *Balraj Kunwar* v. *Jagatpal Singh*[5] that marginal notes should not be referred to in construing Indian enactments.

Even in England the weight of authority is against referring to the marginal notes in construing Acts of Parliament, though the reason that is given is that they are not considered by the Parliament and are not part of the Act. It is difficult to see the force of the observation of Collins, M.R., in *Bushell* v. *Hammond*[6], when he says that marginal notes do not form a part of the Act, but still they can be used to show the drift of the Act. In fact, in England the question has been discussed and it has been held in later cases that marginal notes cannot be referred to for construing Acts of Parliament in *Thomas* v. *Jones*[7], *Wilkes* v. *Goodwin*[8] and *Nixon* v. *Attorney-General*[9] following *Attorney-General* v. *Great Eastern Railway Company*[10].

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1. (1895) L R. 22 I.A. 107 : I.L R. 22 Cal. 788 at 799 and 800 (P.C.).
2. (1919) 38 M.L.J. 444 : L.R. 47 I.A. 33 : I.L.R. 43 Mad. 550 at 564 and 565 (P C.).
3. (1933) I L.R. 57 Bom. 537 (F.B.).
4. I.L.R. (1937) Bom. 293 : A.I.R. 1937 Bom. 198.
5. (1904) L.R. 31 I.A. 132 : I.L.R. 26 All. 393 (P.C.).
6. (1904) 2 K.B. 563.
7. (1921) 1 K.B. 22 at 35.
8. (1923) 2 K.B. 86 at 100.
9. (1930) 1 Ch. 566 at 593 and 594.
10. (1879) 11 Ch. D. 449.

MADHAB CHANDRA GHOSH *v.* NIRODE CHANDRA GHOSH, I.L.R. (1939) 1 Cal. 574.

In this case, a false report was made to the police which was followed by two other reports of a similar nature as a result of which the police started investigation and launched prosecutions which failed. The persons who made the reports to the police deposed in support of their reports in the prosecution. The accused who was acquitted brought a suit for damages based upon the statements made to the police and the depositions in the judicial proceedings. The learned judges have held that the plaintiff is not entitled to succeed, as the suit was one for defamation and the defendants were absolutely privileged.

On the question of absolute privilege, this decision is reminiscent of the old controversy whether in a suit for damages for defamation in this country the defence of absolute privilege is available to parties to proceedings as distinguished from the witnesses. It was held in one line of cases that the privilege was only of a qualified nature and not absolute. Reference may be made in this connection to the decisions in *Augada Ram Shaha* v. *Nemai Chand Shaha*[1], *H. P. Sandyal* v. *Bhaba Sundari Debi*[2], *Raghavendra* v. *Kashinathbhat*[3] and the view of Beachcroft, J., in *C. H. Crowdy* v. *L. O. Reilly*[4]. The weight of authority however has been the other way and it has been held that parties no less than witnesses are entitled to absolute privilege. (See *Pachaiperumal Chettiar* v. *Dasi Thangam*[5], *Chunni Lal* v. *Narsingh Das*[6], *Satish Chandra Chakravarti* v. *Ram Doyal De*[7] and *Ram Kirat Kamkar* v. *Biseswar Nath*[8].) The learned judges in the case under notice have followed the course of authority in the latter cases and held that parties to proceedings also enjoy absolute privilege and not merely a qualified privilege. The Madras High Court at one time went to the length of saying that the rule as to absolute privilege was a defence not only to civil proceedings but also to criminal prosecutions for defamation in In re *P. Venkata Reddy*[9]. The fallacy underlying this

1. (1896) I.L.R. 23 Cal. 867.
2. (1910) 15 C.W.N. 995.
3. (1894) I.L.R. 19 Bom. 717 at 723.
4. (1912) 17 C.W.N. 554.
5. (1908) 13 M.L.J. 353: I.L.R. 31 Mad. 400.
6. (1917) I.L.R. 40 All. 341 (F.B.).
7. (1920) I.L.R. 48 Cal. 388 (S.B.).
8. (1932) I.L.R. 11 Pat. 693.
9. (1912) 23 M.L.J. 39: I.L.R. 36 Mad. 216 (F.B.).

view was however brought out in *Satish Chandra Chakravarti* v. *Ram Doyal De*[1] after an exhaustive review of the decisions and the principles underlying the same by Mookerjee, A. C. J., in delivering the judgment of the Special Bench in that case. The decision of the Madras High Court in In re *P. Venkata Reddy*[2] has since been overruled in *Thiruvengada Mudali (Accused)* v. *Thirupurasundari Ammal (Complainant)*[3] so far as criminal proceedings are concerned.

There is however one observation of one of the learned judges in the case under review where the learned judge observes as an objection to treating the present suit as one for damages for malicious prosecution, that the prosecutor was a Sub-Inspector of Police and the present defendants were not the prosecutors. This observation of the learned judge ought not to be understood as meaning that in no case of police prosecutions an action for malicious prosecution would lie against a private individual. It is not a principle of universal application that if the police act upon an information given by a private individual, that individual does not become the prosecutor. It is a question of fact in each case as pointed out by their Lordships of the Privy Council in *Gaya Prasad* v. *Bhagat Singh*[4]. On the other hand, as observed by their Lordships in *Balbhaddar Singh* v. *Badri Sah*[5], the giving of information to the authorities by an individual which naturally leads to the starting of a prosecution will amount to prosecution by the person who gave the information and will ground an action in tort for malicious prosecution against him. (See also *Periya Goundan* v. *Kuppa Goundan*[6], *Gogineni Venkatappayya* v. *Yerramneni Ramakrishnamma*[7], *Jagadamba Prasad* v. *Raghunandan*[8], *Ram Kishun Prasad* v. *Ram Narain Prasad*[9] and *Radha Kishan* v. *Kedar Nath*[10].)

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1. (1920) I.L.R. 48 Cal. 388 (S.B.).
2. (1912) 23 M.L.J. 39: I.L.R. 36 Mad. 216 (F.B.).
3. (1926) 51 M.L.J. 112: I.L.R. 49 Mad. 728 (F.B.).
4. (1908) 18 M.L.J. 394: L.R. 35 I.A. 189: I.L.R. 30 All. 525 (P.C.).
5. (1926) 51 M.L.J. 42: I.L.R. 1 Luck. 215 (P.C.).
6. (1919) 37 M.L.J. 234: I.L.R. 42 Mad. 880.
7. (1931) 62 M.L.J. 107.
8. (1920) 57 I.C. 392.
9. A.I.R. 1934 Pat. 14.
10. (1924) I.L.R. 46 All. 815.

JOHN MINAS APCAR *v.* LOUIS CAIRD MALCHUS, I.L.R. (1939) 1 Cal. 389.

In cases of innocent as well as fraudulent misrepresentation, the mere existence of the means of discovering the truth with ordinary diligence by the representee is not a defence in English law to any action based on the misrepresentation whether for damages or for the rescission of the contract. The only defences available are actual knowledge of the truth,—not merely constructive or imputed knowledge, as through an agent—and an agreement by the representee to waive enquiry as to the truth of the representation. It is settled in England that apart from a definite agreement to waive enquiry as to the truth of the representations, the mere existence of means of discovering the truth is not a ground which would disentitle the representee from rescinding the contract. The reason for the English rule has been stated to be that no man can complain that another has confided in a misrepresentation made, even if innocently, much less if fraudulently, for the purpose of inspiring that very confidence or plead as an excuse that he whom he has misled was wanting in sagacity or diligence in not testing the statement by enquiry. The English law and the cases on the subject will be found mentioned in Halsbury's Laws of England, Hailsham Edition, Volume 23 at pages 84 to 88 and at page 108 of the same volume. This being the English law on the point, the Indian law has effected a complete departure from it by enacting the exception to S. 19 of the Indian Contract Act to the effect that the existence of the means of finding out the truth is a defence to an action for avoiding a contract on the ground of silence which amounts to fraud within the meaning of S. 17 and on the ground of misrepresentation. This is what has been pointed out by Sir Frederick Pollock and Sir Dinsha Mulla in their commentaries on the Indian Contract Act at pages 128 and 129 of their sixth edition. Though in the opening sentence, they say that there is a departure from the English law, they are not so positive as they proceed in commenting on the exception. It is difficult to see any ambiguity in the language of the exception to S. 19 to warrant the view of the learned judges in *Niaz Ahmad Khan* v. *Parshotam Chandra*[1], that the English law has been kept up in this country. To this extent, the observations of Lort Williams,

1. (1930) I.L.R 53 All. 374.

J., in the case under notice about the statement in *Niaz Ahmad Khan* v. *Parshotam Chandra*[1] seem, with all respect, to be well founded.

On the main point in the case whether the words "fraudulent within the meaning of S. 17" qualify not merely "silence" but also "misrepresentation", the learned judges follow the reasoning and the conclusion of the decision in *Niaz Ahmad Khan* v. *Parshotam Chandra*[1] to the effect that they only qualify "silence" and not "misrepresentation". It may be observed that this view was expressed as early as *Morgan* v. *The Government of Hyderabad*[2], though the point was not discussed so fully by the learned judges in that case.

SHIVAPPA BASAPPA KATTI AND MAHADEVAPPA BASAPPA KATTI *v.* RAO SAHEB VIRAPPA ANDANEPPA MANVI, I.L.R. (1939) Bom. 271.

The interpretation of the expression "assignment by operation of law" in O. 21, r. 16 of the Civil Procedure Code relating to execution of decrees has led to a conflict of opinion by reason of the practical difficulties in its working. As early as 1876, in *Abedoonisa Khatoon* v. *Ameeroonissa Khatoon*[3], it was held by the Privy Council when a decree was obtained by a widow as representing the estate of the deceased husband, a posthumous son who claimed an interest in the decree could not come in under S. 208 of the Civil Procedure Code of 1859 corresponding to O. 21, r. 16 of the present Code. Their Lordships held that no incident had occurred on which the law could operate to transfer any estate from his mother to him. In the words of their Lordships, there was no death, no devolution or succession from the mother to the posthumous son of any interest in the decree. This decision of the Privy Council has led to a restrictive interpretation of the expression "assignment by operation of law" in O. 21, r. 16 as comprising only cases of strict assignment from the decree-holder, such as by death, insolvency or an execution sale of his interest, see *Mahadeo Baburao*-

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1. (1930) I.L.R. 53 All. 374. 2. (1888) I.L.R. 11 Mad. 419.
3. (1876) L.R. 4 I.A. 66: I.L.R. 2 Cal. 327 (P.C.).

Halbe v. *Anandrao Shankarrao Deshmukh*[1]; *Sankaranarayana Menon* v. *Vasu Menon*[2] and the case under notice. On the other hand, a more extended meaning has been given to the expression, as including cases where it was declared that the decree really belonged to another, though it did not stand in his name and therefore it was held that he was entitled to execute the decree in *Ramaswami* v. *Anda Pillai*[3] and *Sreepada Brahmayya Pantulu* v. *Parasuramayya*[4]. Where a decree was obtained in the name of an executor and the probate was subsequently revoked, the heir of the deceased was held to come under the terms of O. 21, r. 16 in *Umasoondury Dassy* v. *Brojonath Bhuttacharjee*[5]. It was also held that where a trustee obtained a decree the beneficiary could come in under that provision. (See *Gobind Singh* v. *Gopal Saran Singh*[6].) Reference may also be made in this connection to *Manorath Das* v. *Ambika Kanta Bose*[7], *Purmananddas Jiwandas* v. *Vallabdas Wallji*[8] and *Khanderav Rayajirav* v. *Ganesh Shastri*[9]. These decisions are based on the obvious practical difficulty to the real owner realising the money, if the person in whose name the decree stands should deprive him of the fruits of the decree by taking them himself or colluding with the judgment-debtor. These are not considerations which should be lightly discarded in doing justice. It has sometimes been said that "the holder of a decree" within the meaning of O. 21, r. 10 is wider than the term "decree-holder" as defined in S. 2 (3) of the Civil Procedure Code and that a person for whose benefit also a decree has been obtained can execute the decree under O. 21, r. 10, though the decree may not stand in his name, even without resorting to O. 21, r. 16 (See *Akhori Ramsewak Prasad* v. *Saran Singh*[10].) But this view has not been accepted in (1939) 2 M.L.J. (Notes of Recent Cases) 16. It is however necessary to protect the interests of the real owners from any misconduct on the part of the nominal decree-holders. It is thus a matter for the High Courts in the exercise of their rule-making power to see whether O. 21, r. 16 may not be suitably altered to meet the

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1. (1933) I.L.R. 57 Bom. 513.
2. (1934) 67 M.L.J. 87.
3. (1890) 1 M.L.J. 240 : I.L.R. 14 Mad. 252.
4. (1902) 12 M.L.J. 348.
5. (1889) I.L.R. 16 Cal. 347.
6. A.I.R. 1924 Pat. 343.
7. (1909) 1 I.C. 57.
8. (1887) I.L.R. 11 Bom. 506.
9. (1887) I.L.R. 11 Bom. 368.
10. A.I.R. 1937 Pat. 607.

needs of the real persons entitled to the benefits under the decree. In this connection, it is necessary to notice that there is a difference of opinion on the question whether a benami transferee of a decree is entitled to execute the decree or the real owner can execute it. (*Palaniappa Chettiar* v. *Subramania Chettiar*[1], *Sankaranarayana Menon* v. *Vasu Menon*[2], *Gurdial Singh* v. *Gurbakhsh Singh*[3] and *Kamta Prasad* v. *Indomati*[4]. *See* contra *Gour Sundar Lahiri* v. *Hem Chunder Chowdhury*[5] and *Balkishen Das* v. *Bedmati Koer*[6]).

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1. (1924) 48 M.L.J. 419: I.L.R. 48 Mad. 553.
2. (1934) 67 M.L.J. 87.
3. (1926) I.L.R. 8 Lah. 35.
4. (1915) I.L.R. 37 All. 414.
5. (1889) I.L.R. 16 Cal. 355.
6. (1892) I.L.R. 20 Cal. 388.

SHAMARAO G. DHAIRYAWAN *v.* RAGHUNANDAN NANU KOTHARE, I.L.R. (1939) Bom. 228.

The question in this case relates to the proper interpretation of S. 1 (2) of the Hindu Law of Inheritance (Amendment) Act II of 1929, whether the Act applies to cases of inheritance of Hindu females in respect of their stridhanam properties. It is well known that succession to stridhanam properties devolves in default of certain specified heirs on the heirs of the father of the deceased woman or on the heirs of her husband. S. 1 (2) of the Hindu Law of Inheritance Amendment Act enacts that it applies in respect only of the property of males. The question therefore arises whether it applies in cases of the stridhanam properties of females where the succession devolves on the heirs of the father or husband, whether they have to be fixed with reference to the provisions of the Act or without reference to the same as the Act does not apply to succession to females. The learned Judge has held that in finding out the father's or husband's heirs for this purpose the order has to be fixed in accordance with the provisions of the Act and that therefore the father's sister's son would take the stridhanam properties in preference to the father's distant sapindas. The reasoning of the learned Judge is that in such cases we have to find who the heirs of the father are and they have been fixed by the Act and that it is immaterial that the question is considered with reference to the succession to stridhanam properties. The same view has been taken by the Lahore High Court in *Mt. Charjo* v. *Dina Nath*[1] and the learned Judge in the present case has come to the same conclusion by his independent reasoning and it does not appear that the Lahore case was referred to before him. Mr. S. Srinivasa Aiyangar in his edition of Mayne's Hindu Law (Tenth Edition) observes in the footnote at page 84 that *Mt. Charjo* v. *Dina Nath*[1] overlooks the provisions of S. 1 (2) of the Act; but this hardly seems to be correct, as Tek Chand, J., refers specifically to the sub-section and construes it in the way that he does. The case under notice is another direct decision against the view of Mr. S. Srinivasa Aiyangar.

It is needless to add that in finding out the heirs of the father for this purpose it is immaterial that he died before the Act came into force, provided that the last owner died after the

1. A.I.R. 1937 Lah. 196 (2).

Act. (See *Lakshmi Ammal* v. *Anantharama Aiyangar*[1], *Mt. Rajpali Kunwar* v. *Sarju Rai*[2], *Shrimati Shakuntla Devi* v. *Kaushalya Devi*[3], *Pokhan Dusadh* v. *Mt. Manoa*[4], *Shankar* v. *Raghoba*[5] and *Shankarrao Dattatraya Nadkarni* v. *Shantibai Shankarrao Nadkarni*[6].)

GUNDA SUBBAYYA *v.* THE COMMISSIONER OF INCOME-TAX, MADRAS, (1939) 1 M.L.J. 451 : I.L.R. (1939) Mad. 404 (F.B.).

Though Tek Chand, J., hoped as early as 1930 in *Muhammad Hayat-Haji Muhammad Sardar* v. *Commissioner of Income-tax, Punjab*,[7] that, considering the controversy in Courts, the legislature will take the earliest opportunity of redrafting and rearranging the clauses in S. 23 of the Income-tax Act, and the legislature also later amended and improved the Act in several important subjects, yet practically no change has been made in S. 23, cls. (3) and (4) regarding the scope of the two clauses. The exact scope of cl. (3) and cl. (4) of S. 23 with regard to the right of the Income-tax Officer to assess a recalcitrant assessee to *the best of his judgment* has been the subject of a wide conflict of decisions. The Division Bench in *Gopinath Naik* v. *Commissioner of Income-tax*[8] was divided in opinion with the result the question was referred to Sulaiman, C. J., who agreed with Niamatullah, J. The view taken in the case under notice is practically that of the other Judge Bapjai, J., in *Gopinath Naik* v. *Commissioner of Income-tax*[8].

Under the English Act in S. 121 both the cases covered by cl. (3) and cl. (4) are treated alike but for some reason the Indian Act has made a distinction between the two cases. A case under cl. (3) is appealable, while one under cl. (4) is not appealable. Cl. (4) empowers the officer to assess "to the best of his judgment" but cl. (3) says that he "shall assess the total income of the assessee" after hearing the evidence produced by the assessee and such other evidence as the Income-tax Officer may require on specified points. It is to be noted that the order

1. (1937) 2 M.L.J. 209 : I.L.R. 1937 Mad. 948 (F.B.).
2. (1936) I.L.R. 58 All. 1041 : A.I.R. 1936 All. 507 (F.B.).
3. (1935) I.L.R. 17 Lah. 356 : A.I.R. 1936 Lah. 124.
4. (1936) I.L.R. 16 Pat. 215 : A.I.R. 1937 Pat. 117 (F.B.).
5. A.I.R. 1938 Nag. 97.
6. (1938) 40 Bom.L.R. 1201 : A.I.R. 1939 Bom. 50.
7. (1930) I.L.R. 12 Lah. 129 at 145 (F.B.).
8. (1935) I.L.R. 58 All. 200.

under cl. (3) is to be in writing. The case under notice has tried to give due weight to these considerations and come to a workable solution by holding that where the assessee fails to produce evidence on which the officer can make a proper assessment of his income, the Income-tax Officer must himself take steps to procure material for the purpose if it is not already in his possession and he must consider such material and make an assessment to the best of his judgment on such material. But the benefit of this view is practically taken away by also holding that though the officer should disclose to the assessee the ***material*** which he has gathered behind the back of the assessee, he need not disclose the *source* of his information. It has been repeatedly held that the evidence on which the officer acts need not be evidence satisfying the technical rules of the Evidence Act but if the proceedings from the stage when the officer issues notice under S. 23 (2) calling upon the assessee to produce evidence in support of the return are treated to be judicial as held by Sulaiman, C. J., in *Gopinath Naik* v. *Commissioner of Income-tax*[1] the logical result of the view would seem to be that the evidence should be taken in the presence of the assessee or within his knowledge (*see also* the observations of the learned Chief Justice at the top of page 409 of 1939 I. L. R. (Mad.). But the distinction drawn in the next observation at page 409, which is later incorporated into the judgment, between disclosure of the ***nature*** of the information and the disclosure of the *source* of such information seems, with all respect, to be more a distinction drawn from the practical difficulty to which the Income-tax Officer will be put to in gathering information.

The difference in the wording of cls. (3) and (4) and the difference in the effects of the orders under the respective clauses (by way of appealability or otherwise), coupled with the fact that though the officer is under cl. (3) acting judicially yet he is not bound by the technical rules of evidence, has been responsible for the sharp difference of opinion between decisions like *Ganga Ram Balmokand* v. *Commissioner of Income-tax*[2] on the one hand and *Gopinath Naik* v. *Commissioner of Income-tax*[1] on the other. In cases falling under cl. (4) it has been held in *S. P. K. A. A. M. Chettyar Firm* v. *Commissioner of Income-tax*[3] and *P. K. N. P. R. Chettyar Firm* v. *Commissioner*

1. (1935) I.L.R. 58 All. 200.
2. (1937) I.L.R. 19 Lah. 10. 3. (1929) I.L.R. 7 Rang. 669 (F.B.).

of Income-tax, Burma[1], that the officer must make the assessment according to rules of reason and justice, not according to private opinion, according to law and not humour and that it should not be arbitrary, vague or fanciful but legal and regular. It has also been held in *In re Binjraj Hukumchand*[2] and *Muhammad Sardar* v. *Commissioner of Income-tax, Punjab*[3], that the assessment can only be on the materials produced before the officer and not upon any figure of profits not warranted by evidence which they have before them. *Gopinath Naik* v. *Commissioner of Income-tax*[4], draws attention to the fact that S. 23 (3) uses the word 'evidence'. *Ganga Ram Balmokand* v. *Commissioner of Income-tax*[5], which takes the contrary view distinguishes these cases on the ground that they do not take account of the proviso to S. 13. But as rightly pointed out by the learned Chief Justice at page 414 in the case under notice S. 13 does not add to or take away anything from S. 23 (3) and has no bearing on the question under review. The decision in *Commissioner of Income-tax, Bihar and Orissa* v. *Maharajadhiraja of Dharbanga*[6] has only added to the difficulty.

BHARI JENA *v.* GAURANGA CHARAN SAHU, (1939) I.L.R. 18 Pat. 210 and MAHBOOB KHAN *v.* MAJID HUSAIN, I.L.R. (1939) All. 403.

In these two decisions the question raised was whether in the absence of an application to set aside the sale, the deposit of the sums required by O. 21, r. 89 alone is enough to set aside the sale or an application for the purpose is absolutely essential. In the Patna case, there was a proper deposit in time but a formal application to set aside the sale was not filed till 45 days after the sale, though the fact of the deposit was expressly brought to the notice of the presiding Judge on the 32nd day when the chalan showing the deposit was put up before him. The Court held that the sale could not be set aside for want of an application. In the Allahabad case the judgment-debtor "came to the Court with a form of tender for deposit of the sale price and 5 per cent. as required by O. 21, r. 89" in time but the "form of tender did not use the actual words that the sale

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1. (1929) I.L.R. 8 Rang. 203. 2. (1931) I.L.R. 58 Cal. 1446 (F.B.).
3. (1930) I.L.R. 12 Lah. 129 (F.B.).
4. (1935) I.L.R. 58 All. 200. 5. (1937) I.L.R. 19 Lah. 10.
6. (1933) 64 M.L.J. 612 : L.R. 60 I.A. 146 : I.L.R. 12 Pat. 318 (P.C.).

should be set aside". and there was no other application to set aside the sale. Yet the Court held that "it is clearly the intention of a person presenting this form to a Court for signature that the deposit is being made for that purpose", that is, for the purpose of having the sale set aside. This reasoning sounds like that of Ameer Ali, J., in *Abdul Latif Moonshi v. Jadub Chandra Mitter*[1], where the learned Judge says that "the fact of his depositing the amount is a sufficient indication of his intention to seek the relief which the law provides. He brings in the money with what object? Surely for no other reason but to have the sale of his holding set aside". *Abdul Latif Moonshi v. Jadub Chandra Mitter*[1], was a case under S. 174 of the Bengal Tenancy Act and cl. 2 of that section also relied on by Ameer Ali, J., speaks only of the *deposit* and not of an application but that portion of the judgment may not apply to a case under the Civil Procedure Code as O. 21, r. 92 (2) speaks also of an *application* under r. 89. The view taken in *Mathiji v. Kondaji*[2], that the essential on which the action of the Court is to depend is the deposit within the 30 days period and not the fact of application within that period has not generally found favour with the Courts and it has also expressly been dissented from (see *Pechiayee v. Vallaimuthi Velan*[3], *Venkata Narasimma v. Lakshmi Narasimham*[4], *Mahomed Akbar Zaman Khan v. Sukhdeo Pande*[5], *Venkatasubba Rao v. Narayana Rao*[6], *Nasiruddin Haider v. Hakim Muhammad Tahir*[7] and *Bur Singh v. Uttam Singh*[8]). Some cases have therefrom gone to the length of holding that the lodgment schedule cannot be treated as an application (*Venkatasubba Rao v. Narayana Rao*[6], *Chakrapani Padhi v. Krushno Naiko*[9] and *Sarvi Begum v. Haider Shah*[10]). But it is uniformly agreed that no special form of application is necessary, and that it may even be oral (*Murugappa Asari v. Shanmuga Mudaliar*[11], *Ramraj Singh v. Rabi Prasad*[12] and *Maniappa Annavi v. Harihara Aiyar*[13]) and it would therefore seem that it is a mere formality to insist on an application. In *Parat Veetil Seethi v. Ambalath Veetil Kolathur Ahmad*[14], even a formal prayer was not insisted on and when the petition was

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1. (1897) I.L.R. 25 Cal. 216.
2. (1905) 7 Bom.L.R. 263.
3. (1924) 48 M.L.J. 405.
4. (1916) 3 L.W. 174.
5. (1911) 13 C.L.J. 467.
6. A.I.R. 1922 Mad. 83.
7. A.I.R. 1936 Pat. 119 at 120.
8. (1910) 21 M.L.J. 100: L.R. 38 I.A. 13: I.L.R. 38 Cal. 355 (P.C.).
9. A.I.R. 1926 Mad. 620.
10. (1912) 9 A.L.J. 12: 13 I.C. 404.
11. A.I.R. 1925 Mad. 909.
12. (1921) 63 I C. 140.
13. (1914) M.W.N. 62.
14. (1915) 32 I.C. 45.

filed, the Court allowed the addition of the formal prayer. That is responsible for the decisions in *Ramraj Singh* v. *Rabi Prasad*[1]; *Vannisami Thevar* v. *Periyasami Thevar*[2], where an oral application was presumed from the affidavit accompanying the deposit; *Abdul Latif Moonshi* v. *Jadub Chandra Mitter*[3] and *Maniappa Annavi* v. *Harihara Aiyar*[4]; see also *Banarsi Das* v. *Ram Chandra*[5], where an application for permission to deposit was treated as an application to set aside sale. It cannot be denied that this is an indulgence to the debtor and a strict compliance with the requirements of the section is necessary. It has accordingly been held that even a day's delay in depositing cannot be extended. *Mahomed Cassim* v. *A. J. David*[6], *Shashi Bhushan Banerjee* v. *Charushila Debi*[7], *Mahommad Din* v. *Sharampet*[8] and *Rameshwar Misser* v. *Sureshwar Misser*[9]. The Patna decision under review relies on *Baoji* v. *Bansilal Narain*[10] but in that case it is not clear if the judges relied for the decision on the absence of the application. There is no reference in the judgment to *Mathiji* v. *Kondaji*[11]. There were several other considerations referred to in the judgment. A prior application for the purpose had been dismissed and not appealed against and the application before the Court was more than 3 years old. The other circumstance referred to in *Baoji* v. *Bansilal Narain*[10] that the sale was confirmed may not matter, because if no application be necessary, then the confirmation after deposit may be treated as nullity. See *Murugappa Asari* v. *Shanmuga Mudaliar*[12], a case where an oral application had been made but the Court in ignorance of it had confirmed the sale. The Patna case evidently does not treat the chalan showing the deposit as an application, for otherwise the Court might have relied on that to give relief to the debtor. Though the chalan was put before the learned Munsiff on the 32nd day, the chalan must have been filed within the 30 days as it would have been filed with the deposit which was made in time and the delay of the Court to deal with the matter ought not to prejudice the party. (*Mahomed Akbar Zaman Khan* v. *Sukhdeo Pande*[13] and *Munna Lal* v. *Parbhu Dayal*[14].)

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1. (1921) 63 I.C. 140.
2. (1916) 3 L.W. 271.
3. (1897) I.L.R. 25 Cal. 216.
4. (1914) M.W.N. 62.
5. A.I.R. 1933 Lah. 210.
6. (1928) I.L.R. 6 Rang. 490.
7. (1916) 36 I.C. 809.
8. A.I.R. 1926 Lah. 639.
9. (1917) 39 I.C. 664.
10. (1919) I.L.R. 43 Bom. 735.
11. (1905) 7 Bom.L.R. 263
12. A.I.R. 1925 Mad. 909.
13. (1911) 13 C.L.J. 467.
14. (1915) I.L.R. 37 All. 591.

T. L. WILSON *v.* HARI GANESH JOSHI, I.L.R. (1939) Bom. 307.

This decision is one of more than ordinary interest to lawyers as it relates to the question of the legality of contingent fees being settled in the event of the success of a litigation. A firm of solicitors in England agreed with a poor client in India that they would do her work in a case before the Privy Council for a smaller remuneration having regard to her poverty and that if she should succeed before the Privy Council she should pay the ordinary higher remuneration for his services. The learned Judges upheld the legality of the agreement and the solicitor was awarded the higher remuneration as the client succeeded before the Privy Council.

The question was decided with reference to S. 63 of the English Solicitors Act of 1932, 22 & 23 George V, Chapter 37, which provided that "Nothing in the four last preceding sections of this Act shall give validity to:—(*ii*) Any agreement by which a solicitor retained or employed to prosecute any action, suit or other contentious proceeding stipulates for payment only in the event of success in that action, suit or proceeding." Those preceding sections relate to the agreement for remuneration between solicitors and clients. The provision referred to above relates only to cases where the solicitor agrees to payment in the event of success; and the case under consideration was not one of that sort. The learned judges go on to observe that the provision is only aimed at champertous agreements and there is no rule of common law rendering the agreement in the case illegal.

The application of the rule to the other branches of the legal profession in this country seems to be by no means clear. In America where the conditions of the bar seem to be more analogous to those in this country, where with very few exceptions all members of the bar can both plead and act in a cause, the system of a contingent fee based on the success in the cause is not regarded as illegal or even unprofessional. *See* the American authorities cited in *Ganga Ram* v. *Devi Dasi*[1]. In England, on the other hand the system of contingent fees has been looked on with disfavour both for the barristers and the solicitors. See *Earle* v. *Hopwood*[2], a case of a solicitor who

1. 61 P.R. 1907 (F.B.).
2. (1861) 9 C.B.N.S. 566: 142 E.R. 222.

agreed to take his remuneration by a certain percentage of the successful issue in the cause and *Morris* v. *Hunt*[1] and *Penrice* v. *Parker*[2]. These decisions have been rested on the illegality of the agreements based on the rules against maintenance and champerty in England. In India, the English rules against maintenance and champerty as such have no force and it has been held an agreement cannot be held to be void merely for those reasons. (*Chedambara Chetty* v. *Renga Krishna Muthuvira Puchaiya Naicker*[3], *Ram Coomar Coondoo* v. *Chunder Canto Mookerjee*[4], *Subhadrayamma* v. *Poosapati Venkatapati*[5] and *Bhagawat Dayal Singh* v. *Debi Dayal Sahu*[6].)

The agreements may be bad for reasons such as undue influence, coercion or fraud which are quite different considerations. It may also be, having regard to the fiduciary relation between the legal adviser and his client, the burden may be on the former to make out that a *prima facie* unconscionable agreement was not brought about by undue influence, *cf*. S. 16 of the Indian Contract Act. Some Indian cases have gone further and held that such agreements are illegal as being opposed to public policy. Some of the judges who constituted the bench in *Ganga Ram* v. *Devi Das*[7], took that view, while the other Judges in the same case held the contrary. Reference may be made to the following cases where no uniform rule has been laid down, in this respect. *Achamparambath Cheria Kunhammu* v. *William Sydenham Gantz*[8], *Ramchandra Chintaman* v. *Kalu Raju*[9], *Shivram Hari* v. *Arjun*[10], *Parshram Vaman* v. *Hiraman Fatu*[11], In re *Bhandara*[12], *Radha Kishen* v. *Bakhtawur Lall*[13] and In the matter of *Moung Htoon Oung*[14]. We are not sure whether the views of some of the judges in the

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1. Chit 544.
2. (1673) Finch 75 : 23 E.R. 40.
3. (1874) L.R. 1 I.A. 241 (P.C.).
4. (1876) L.R. 4 I.A. 23 : I.L.R. 2 Cal. 233 (P.C.).
5. (1924) 47 M.L.J. 93 : L.R. 52 I.A. 1 : I.L.R. 48 Mad. 230 (P.C.).
6. (1908) 18 M.L.J. 100 : L.R. 35 I.A. 48 : I.L.R. 35 Cal. 420 (P.C.).
7. 61 P.R. 1907 (F.B.).
8. (1881) I.L.R. 3 Mad. 138 (F.B.).
9. (1877) I.L.R. 2 Bom. 362.
10. (1881) I.L.R. 5 Bom. 258.
11. (1884) I.L.R. 8 Bom. 413.
12. (1901) 3 Bom.L.R. 102 (F.B.).
13. (1869) 1 N.W.P. 1.
14. (1874) 21 W.R. 297.

above-cases have not been tinged by the English rules against champerty and maintenance. The consideration that a legal practitioner may resort to improper practices to win the case to earn the higher fee in the event of success may apply with considerable force even for the original fee itself, which is not always paid in advance.

It is however one thing to say that such agreements are illegal and another to say that it is unprofessional for a lawyer to enter into such agreements. Recently the Madras High Court has held in In the matter of *Ramanujachariar*[1], that an agreement between an advocate and his client to take a certain percentage of the proceeds in a suit as a remuneration only in the event of success amounts to professional misconduct. The decision under review may, we venture to think, be taken to lend countenance to the view if a legal practitioner agrees to take a smaller fee having regard to the poverty of the client and that in the event of success to take the full regulation fee, it is neither illegal nor unprofessional.

DEVA DUTTA SAROGI & SON *v.* P. C. MITTER & SON, I.L.R. (1939) 2 Cal. 143.

This decision lays down what has generally been assumed in all the prior decisions that the word "assets" used in S. 73 of the Civil Procedure Code cannot be understood in the wider sense as including every kind of property but that it only means monies. This is made clear by the succeeding words in the section referring to its realisation and distribution among the money decree-holders. In *Ramanathan Chettiar* v. *Subramania Sastrial*[2], "assets" in the corresponding section of the old Code of 1882 has been held to mean the proceeds of the sale of the properties sold in execution which can only be in money. A similar meaning was given to it by Sir Lawrence Jenkins, C. J., in *Manilal Umedram* v. *Nanabhai Maneklal*[3], referred to by the learned Judge in this case. The prior cases on the point were referred to and reviewed in *Umar Sharif* v. *Rodba*[4]. Consequently the learned

1. (1939) 2 M.L.J. 320 (F.B.).
2. (1902) 12 M.L.J. 276: I.L.R. 26 Mad. 179.
3. (1903) I.L.R. 28 Bom. 264 at 274. 4. A.I.R. 1925 Nag. 157.

Judge held in the case under notice that where the properties were only taken possession by a receiver appointed in execution and they were not sold and their proceeds were not received by him, there were no "assets realised in the course of execution or otherwise", within the meaning of S. 53 of the Presidency Towns Insolvency Act which uses words similar to S. 73 of the Civil Procedure Code in this respect. There can be no doubt that the same would be the view even under S. 51 of the Provincial Insolvency Act of 1920 where similar expressions are used.

ANWAR ALI BEPARI *v.* JAMINI LAL RAY CHAUDHURI, I.L.R. (1939) 2 Cal. 254.

In this case, the learned judge has held that a notice to quit is invalid because it was not served on the heirs of one of the joint lessees but was only served on the surviving lessee. The argument was advanced that on the death of one of the lessees his interest was not heritable and that the surviving tenant was the only person entitled to the leasehold and as the notice was served on him it was valid. This argument was overruled and the learned judge held that a leasehold interest was heritable. Even taking that the heirs of the deceased lessee were jointly entitled with the surviving tenant to the leasehold, the question will still remain whether the notice to quit should be served on all of them.

In England, it was held by Lord Ellenborough, C. J., in the early case of *Macartney* v. *Crick*[1], that where a property was held by lessees jointly, service of notice to quit on one of them alone was a sufficient notice to quit. This decision has been referred to without disapproval or dissent in the leading English treatises on Landlord and Tenant. *See* Woodfall's Law of Landlord and Tenant, 20th Edition, page 428. Foa on Landlord and Tenant, 5th Edition, page 605. In another case, it was held that service on one of the joint lessees was *prima facie* proof of the service on all of them until it was disproved. (See *Doe* v. *Watkins*[2].) In India, the requisites of a valid notice to quit have been enacted in S. 106 of the Transfer of Property Act and the question is whether it lays down a different rule on this point. It has been laid down by the Privy Council in *Harihar Banerji* v. *Ramshashi Roy*[3], following the English cases referred to above, that the service of a notice to quit on one of the joint tenants is *prima facie* evidence that it has reached the others. This rule has no application where the rights of the other co-tenants have been ignored as in this case under notice. (See also *Bejoy Chand Mahatab* v. *Kali Prasanna Seal*[4]). If, on the other hand, the rights of the other joint lessees are not ignored, the notice served on one of the joint tenants will be *prima facie* proof of service on the other joint tenants as well. (See *Bodordoja* v. *Ajijuddin Sarkar*[5], *Rajoni Bibi* v. *Hafison-*

1. (1805) 5 Esp. 196.
2. (1806) 7 East 551: 103 E.R. 213.
3. (1918) 35 M.L.J. 707: L.R. 45 I.A. 222: I.L.R. 46 Cal. 458 (P.C.).
4. (1925) 29 C.W.N. 620.
5. (1929) I.L.R. 57 Cal. 10.

nissa B bi[1] and *Kedar Nath Sadhukhan* v. *Madhu Sudan Das*[2].) If, however, it is proved that the notice did not reach the other joint lessees, the notice, it would seem, will be invalid both under the English and the Indian Law.

KRISHNADAS PADMANABHRAO CHANDAVARKAR *v.* VITHOBA ANNAPPA SHETTI, I.L.R. (1939) Bom. 340 (F.B.).

This decision of the Full Bench of the Bombay High Court which lays down that a judgment against an infant cannot be set aside by reason of the gross negligence of his next friend or guardian *ad litem* is at variance with the uniform current of later decisions on this point in all the High Courts including the Bombay High Court which have been referred to in the arguments and the judgment in this case. The learned Chief Justice gave expression to this view in a prior decision by him as a single judge in *Auraj Joharmal Marwadi* v. *Dalpat Supadu*[3], and the other learned judges who were inclined to think that the question required fuller investigation in their order of reference, finally agreed with him though with some hesitation.

In coming to this conclusion the learned Chief Justice has examined the English Law on this point and quoted the statements in the leading text books which are contrary to his view but held they are not correct. The passages in Simpson on Infants, 4th Edition, page 424, Seton on Judgments and Decrees 7th Edition page 939 and Halsbury's Laws of England 2nd Edition, Vol. XVII, page 708 and the observations of Lord Hardwicke as early as 1747 in *Gregory* v. *Molesworth*[4] and Malins, V. C., in In re *Hoghton*: *Hoghton* v. *Fiddey*[5], are sufficiently weighty authorities under the English Law that a judgment against an infant can be reopened for gross negligence on the part of his next friend or guardian *ad litem*. The fact that the question was not considered in those ancient cases in all its fulness or that the question did not arise directly for decision is sufficiently met by the fact that they have been recognised as laying down the law correctly by the leading text books of authority and there is no direct decision to the contrary in England to this day. Among other text books may be mentioned Macpherson on Infants, page 346, referred to in *Brij Raj* v. *Ram*

1. (1900) 4 C.W.N. 572. 2. A.I.R. 1923 Cal. 682.
3. I.L.R. (1937) Bom. 839: A.I.R. 1937 Bom. 464.
4. (1747) 3 Atk. 626: 26 E.R. 1160. 5. (1874) L.R. 18 Eq. 573.

Sarup[1] and Trevelyan on Minors, 6th Edition at page 284. In the face of such a large body of legal opinion to the contrary, we are not sure that this decision of the Bombay High Court will start another course of unsettlement on the point. If it is recognised that a judgment against a minor can be reopened by reason of the gross negligence of the next friend or guardian *ad litem*, there can be no doubt that a suit will be a more appropriate and effectual means of vacating the prior judgment, than a review whose limits are strictly circumscribed by the Civil Procedure Code.

CHARANDAS VASSANJI *v.* DOSSABHAI MAGANLAL, I.L.R. (1939) Bom. 389.

The question whether the Court in settling a sale proclamation is under a duty to arrive at and state its own estimate of the value of the properties to be sold furnished a fruitful source of conflict of decisions in the various High Courts and an additional ground was furnished to the judgment debtor for an application to set aside the execution sale and delaying the decree-holder from realising the fruits of his decree. The High Courts of Madras and Allahabad however held that the Court was not bound to arrive at and state its own estimate of the properties brought to sale, in the proclamation of sale. *Thiruvengadaswami Aiyangar* v. *Govindaswami Udayar*[2] and *Muhammad Said Khan* v. *Muhammad Abdus Sami Khan*[3], while the Calcutta and the Patna High Courts held the contrary. *Banbihari Chatterji* v. *Bhukhanlal Chaudhuri*[4], and *Munshi Raghunath Singh* v. *Hazari Sahu*[5]. In the decision under notice, the learned judges have agreed with the view held in Madras and Allahabad and held that the Court is under no duty to arrive at and state the value of the properties to be sold in the sale proclamation and the learned Chief Justice has pointed out how the decision of the Privy Council in *Saadatmand Khan* v. *Phul Kuar*[6] has been misunderstood as being an authority for the contrary view. In many of the provinces, the point is now only of academic interest as the High Courts of Madras,

1. (1925) I.L.R. 48 All. 44.
2. (1927) 55 M.L.J. 363: I.L.R. 51 Mad. 655.
3. A.I.R. 1932 All. 664.
4. (1932) I.L.R. 60 Cal. 581.
5. (1917) 2 Pat.L.J. 130 (F.B.).
6. (1898) L.R. 25 I.A. 146: I.L.R. 20 All. 412 (P.C.).

Patna, Lahore, Rangoon, Nagpur and the North-West Frontier Province have framed rules under their rule making power and added a further clause to O. 21, r. 66 or further words rendering it unnecessary for the Court to fix the value of the properties to be sold. After these alterations to the rule, it is sufficient if the value as given by the parties is stated in the sale proclamation. It is a matter for the consideration of the Bombay High Court if a similar alteration in the rule should not be made by that High Court also to obviate any different view being taken in the future by that High Court leading to a conflict of decisions.

INDERDEO SINGH *v.* RAMLAL SINGH, (1939) I.L.R. 18 Pat. 429.

The question in this case was as to the article of the Limitation Act that governs a suit by a mortgagee on the personal covenant contained in the mortgage-deed, when the mortgage is vitiated by reason of the doctrine of fraud on registration. The bond was registered at Tikari by adding in the description of land a piece of land at Tikari which entry was found to be fictitious and it was also found that the mortgagor and the mortgagee were parties to the fraud. The bond was therefore rightly held to be invalid as a mortgage but as the suit was within six years, the mortgagee claimed a personal decree against the mortgagor. It is here that there is a definite cleavage of opinion between the Madras High Court and the Calcutta High Court and the difference of view is largely based on the exact scope of the judgment of the Judicial Committee in *Biswanath Prasad* v. *Chandra Narayan Chowdhury*[1]. The Madras High Court has held in a considered judgment in *Rama Rao* v. *Vissapragada Vedayya*[2], that though the document may be invalid as one obtained by a fraud on the registration law, yet the document is registered and falls within Art. 116 of the Limitation Act. It has uniformly been held that a claim to enforce the personal covenant contained in the mortgage-deed is a claim "for compensation for the breach of a contract in writing registered" and is governed by Art. 116, though Mr. Justice Mitter doubts the correctness even of this view in

1. (1921) 40 M.L.J. 489: L.R. 48 I.A. 127: I.L.R. 48 Cal. 509 (P.C.).
2. (1922) 44 M.L.J. 573: I.L.R. 46 Mad. 435.

Sailendra Nath v. *Keshab Chandra Chowdhury*[1]. (See *Vasanji Kalianji* v. *Erachsha Dossabhai*[2], *Maharaj Bahadur Singh* v. *Abdul Majid*[3], *Chengalamma* v. *Veeraraghava*[4], *Ratnasabapathy Chettiar* v. *Deivasigamani Pillai*[5], and *Radhakrishna* v. *Tej Saroop*[6].) It has also been held that where a mortgage fails as a mortgage for want of attestation, or other causes, yet it is to be treated as a registered contract and is governed by Art. 116. (See *Dinkar Hari* v. *Chhaganlal Narsidas*[7], *Ram Narayan Singh* v. *Adhindra Nath Mukherji*[8], *Sonatun Shaha* v. *Dino Nath Shaha*[9] and *Joginee Mohan Chatterjee* v. *Bhoot Nath Ghosal*[10]). But in *Sailendra Nath* v. *Keshab Chandra Chowdhury*[1] it is held that where the mortgage is invalid as in fraud of registration, then it is a case where the parties are guilty of fraud and a mortgagee who is a party to such fraud should not be allowed to take advantage of it. With all respect, this reasoning overlooks the fact that he is not seeking to take advantage of the fraud because the fraud consisted in trying to get a mortgage right over it. Logically pursued, the Court may have to hold that the document could not be sued on even in three years under Art. 66. As pointed out by the learned authors of the sixth edition of Mitra's Limitation "so far as the personal covenant on the part of the mortgagor is concerned the instrument may be considered as being duly registered, for under S. 29 of the Registration Act there is no restriction as to the place of registration with respect to persons executing or claiming under the instrument". The learned authors point out that in this view *Kalka* v. *Mathura Das*[11] is open to doubt. The Oudh Court has later held that *Kalka* v. *Mathura Das*[11] is not correctly decided. It was in this form that the argument was advanced in the case under notice by Mr. Sarjoo Prasad when he suggested that "it should be considered that there was no fraud in obtaining registration so far as the personal covenant was concerned, because if the bond had contained nothing but the personal covenant, the provisions of

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1. (1937) 41 C.W.N. 783.
2. (1934) I.L.R. 59 Bom. 634.
3. (1938) 68 C.L.J. 109.
4. (1928) 55 M.L.J. 506.
5. (1928) 56 M.L.J. 10: I.L.R. 52 Mad. 105 (F.B.).
6. (1929) I.L.R. 52 All. 363: A.I.R. 1930 All. 69 (F.B.).
7. (1913) I.L.R. 38 Bom. 177.
8. (1916) 32 M.L.J. 39: L.R. 44 I.A. 87: I.L.R. 44 Cal. 388.
9. (1898) I.L.R. 26 Cal 222.
10. (1902) I.L.R. 29 Cal. 654.
11. (1918) 50 I.C. 220.

S. 29 of the Registration Act would have applied and the document could have been registered at any registry office" but the argument has been negatived as having the effect of calling the document something other than what it is. In *Sailendra Nath* v. *Keshab Chandra Chowdhury*[1] and *Jogeshwar Prasud Onkar Prasad* v. *Mulchand*[2], the difficulty felt is that as the effect of fraud on the Registration Law affects the deed as a whole, it cannot be said that the deed is to be treated as an unregistered document for one purpose and a registered document for another. With respect, this assumes that fraud vitiates the whole deed and not merely the mortgage nature of it. As Mr. Justice Phillips points out at page 438 in *Rama Rao* v. *Vedayya*[3], there was no fraud on the Registration Law in so far as the document evidenced a mere covenant to pay, and to extend the invalidity also to that part of it will be "to deprive a party of a right which he had not obtained by fraud as well as of the advantage gained by his fraud". A document may be invalid in some parts but valid in other parts, provided they are separable parts.

Apart from *a priori* discussions based on these general aspects of the question, the real difficulty is caused by the course adopted by the Judicial Committee in *Biswanath Prasad* v. *Chandra Narayan Chowdhury*[4] and the view of the Madras High Court receives large support from the arguments in that case as extracted in the report of the case in *Biswanth Prasad* v. *Chandra Narayan Chowdhury*[4]. But the Calcutta High Court and following it, Nagpur and Patna High Courts do not agree with that interpretation of *Biswanath Prasad's case*.[4]

[END OF VOL. II.]

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1. (1937) 41 C.W.N. 783. 2. A.I.R. 1939 Nag. 57 (F.B.).
3. (1922) 44 M.L.J. 373: I.L.R. 46 Mad. 435.
4. (1921) 40 M.L.J. 489: L.R. 48 I.A. 127: I.L.R. 48 Cal. 509 (P.C.).